No. 49025-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of

Jeffrey Payne,

Appellant.

Kitsap County Superior Court Cause No. 10-2-00296-2

The Honorable Judge Sally Olsen

Appellant's Reply Brief

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I. THE DEPARTMENT DID NOT SHOW THAT A MENTAL DISORDER CAUSES MR. PAYNE "SERIOUS DIFFICULTY" CONTROLLING HIS BEHAVIOR.

A. The state failed to establish that Mr. Payne has "serious difficulty" controlling his behavior.

Civil commitment must rest on proof that a detainee has "serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002). The state's evidence on this point is what distinguishes a sexually violent predator from a typical dangerous recidivist. *Id.; In re Det. of Thorell*, 149 Wn.2d 724, 732, 72 P.3d 708 (2003).

To justify commitment, the state must produce at least some proof that the detainee has "a serious lack of control" over his behavior. *Thorell,* 149 Wn.2d at 735. Here, the evidence on this point was lacking.

Dr. Carlson did not offer an explicit opinion on the subject. CP 11-34. Nowhere in her report does she expressly state that Mr. Payne has "serious difficulty controlling his behavior," or that he has a "serious lack of control over his behavior." CP 11-34. Although not essential, an

explicit opinion would have made clear that continued commitment meets constitutional standards under *Crane.*[1]

Nor does Dr. Carlson's report indirectly establish that Mr. Payne has serious difficulty controlling behavior rather than the routine motivations and impulses that produce recidivism generally. Her opinion that Mr. Payne's "emotional or volitional capacity" is affected and that he is "predispose[d]" to commit criminal sexual acts does not suggest *serious* difficulty or a *serious* lack of control. CP 32; *cf. Crane*, 534 U.S. at 413; *Thorell,* 149 Wn.2d at 735.

Respondent argues that the evaluator need not "make an independent determination that a person has 'serious difficulty controlling behavior.'" Brief of Respondent, pp. 14-15 (citing *Thorell,* 149 Wn.2d at 735-36). This is true, and Mr. Payne does not argue otherwise.

Nor does Mr. Payne suggest that "a fact finder [must] make a legal conclusion about 'serious difficulty controlling behavior.'" *See* Brief of Respondent, p. 15. As Respondent observes, all that is required is "some proof." Brief of Respondent, p. 15 (citing *Thorell,* 149 Wn.2d at 736).

[1] Mr. Payne does not argue for a "requirement that Dr. Carlson 'explicitly opine' that [he] has 'serious difficulty controlling his behavior.'" Brief of Respondent, p. 18. Rather, he suggests that an explicit opinion, adequately supported by facts, would unambiguously meet the state's burden.

Respondent's error is in suggesting that the state can meet this requirement with something other than "some proof" of serious difficulty controlling behavior. Relying on one isolated phrase in *Thorell,* taken out of context, Respondent proposes that the state need only show "that the mental abnormality *impacts* the person's ability to control his behavior." Brief of Respondent, p. 15 (emphasis added) (citing *Thorell,* 149 Wn.2d at 736).

As the context makes clear, the *Thorell* court's shorthand (requiring proof of "*an impact* on offenders' ability to control their behavior"[2]) was not intended to dispense with the constitutional requirement outlined by the U.S. Supreme Court in *Crane.* The very next sentence in *Thorell* reads:

> *Crane* requires linking an SVP's *serious difficulty in controlling behavior* to a mental abnormality, which together with a history of sexually predatory behavior, gives rise to a finding of future dangerousness, justifies civil commitment, and sufficiently distinguishes the SVP from the dangerous but typical criminal recidivist.

Thorell, 149 Wn.2d at 736 (emphasis added). *Thorell* does not suggest that a mere "impact" on ability to control behavior suffices.[3] Instead, *Thorell*

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[2] *Thorell*, 149 Wn.2d at 736 (emphasis added).

[3] A showing of "impact" is necessary but not sufficient for commitment; this becomes clear when the word "impact" is examined in the context of the opinion as a whole. *Id.*

and *Crane* require proof linking the detainee's condition with a "*serious difficulty* controlling behavior." *Id.*

Other language in *Thorell* confirms this:

> The United States Supreme Court recently clarified [the] mental illness element in SVP commitment proceedings as one requiring "proof of serious difficulty in controlling behavior." *Id.,* at 732 (quoting *Crane,* 534 U.S. at 413).
>
> We conclude that *Crane* requires a determination that a potential SVP has serious difficulty controlling [behavior, but does not require a separate finding]. *Id.,* at 735.
>
> [T]he jury's finding that an SVP suffers from a mental illness… coupled with the person's history of sexually predatory acts, must support the conclusion that the person has serious difficulty controlling behavior. *Id.,* at 735.
>
> [At a commitment trial, there must be] sufficient evidence in the finding of mental illness to allow a rational trier of fact to conclude the person facing commitment has serious difficulty controlling behavior. *Id.,* at 744-45.
>
> *Crane* [does] require SVP commitments to be supported by proof beyond a reasonable doubt of serious difficulty controlling behavior." *Id.,* at 745.
>
> [To uphold commitment,] we must determine that the mental abnormality or personality disorder, coupled with the person's sexual offense history, supports the finding that the person has serious difficulty controlling his behavior beyond a reasonable doubt. *Id.,* at 759.

As these quotations show, the state must establish that a detainee has "serious difficulty controlling behavior." *Id.,* at 736.

Because the state failed to establish "serious difficulty," Mr. Payne's continued commitment must be tested through a jury trial. RCW 71.09.090(2)(c)(i). The trial court's order must be reversed and the case remanded for trial.

B. The state failed to prove a link between Mr. Payne's mental condition and serious difficulty controlling behavior.

In addition to proving "serious difficulty" controlling behavior, the state must show a link between Mr. Payne's mental condition and any such difficulty. *Thorell*, 149 Wn.2d at 736. It is this link that "sufficiently distinguishes the SVP from the dangerous but typical criminal recidivist." *Id.*

Dr. Carlson did not explicitly tie Mr. Payne's mental condition to evidence that he has serious difficulty controlling behavior. CP 11-34.[4] Nor does her assessment of Mr. Payne's risk of sexual reconviction or his predisposition to commit sexual crimes establish such a link. As with any "dangerous but typical criminal recidivist," Mr. Payne's predisposition or elevated risk stems at least in part from motivation and choice. Absent proof, his predisposition or risk level does not establish a link between his

[4] An explicit opinion is not required; however, it would make clear that the state has met its burden.

mental condition and "a serious lack of control" over his behavior. *Thorell,* 149 Wn.2d at 735.

Also insufficient is Dr. Carlson's opinion that Mr. Payne's mental condition has some unquantified effect on his "emotional or volitional capacity." CP 32. She does not say whether his disorder causes a minor impairment or a significant deficiency in managing behavior. CP 32. A slight effect on his capacity to control his conduct does not diminish the role that motivation and choice play in his offending and cannot distinguish him from "the dangerous but typical criminal recidivist." *Thorell*, 149 Wn.2d at 736. Dr. Carlson's failure to describe the magnitude of any effect amounts to a deficiency in the state's proof.

Nor does Dr. Carlson explain how Mr. Payne's age—he is currently 55—plays into any link between his diagnoses and his alleged inability to control his behavior. CP 11. Both pedophilic disorder and antisocial personality disorder can change as a person ages. CP 66-67. Even if his mental condition previously had some substantial effect on his capacity to control his behavior, causing "serious difficulty," Dr. Carlson fails to explain how his current age affects her view of any such connection. CP 11-34.

Respondent erroneously asserts that the state meets its burden "by showing a link between the person's mental disorder and the likelihood of

committing future acts of sexual violence." Brief of Respondent, p. 16 (citing *Thorell*, 149 Wn.2d at 743). Respondent's misunderstanding of the law is again based on a misreading of one isolated phrase in *Thorell,* taken out of context.

As noted above, "*Crane* requires linking an SVP's *serious difficulty in controlling behavior* to a mental abnormality." *Thorell*, 149 Wn.2d at 736 (emphasis added). It is not enough to assert a link between a person's mental abnormality and his risk of recidivism. Brief of Respondent, p. 16. The required link is a causal link between the mental condition and the person's serious difficulty controlling behavior. *Id.*[5]

The reason for this is clear. Any person with a paraphilia (such as pedophilia) will have an elevated risk of committing the kind of offense associated with the condition. But civil commitment requires evidence that distinguishes between sexually violent predators and "the dangerous but typical criminal recidivist." *Id.*, at 736. That is, the state must prove (for example) that a detainee is not merely a serial pedophile who chooses to

[5] The *Thorell* court found the pattern instruction sufficient to convey this standard. *Id.*, at 742-743. The instruction requires jurors to find that a detainee's "mental abnormality or personality disorder *makes* [him] likely to engage in predatory acts of sexual violence." *Id.*, at 742 (emphasis added). Other than a single boilerplate sentence parroting the language of the statute, Dr. Carlson did not opine that Mr. Payne's condition *makes* him likely to engage in such acts or otherwise link the conditions to a serious difficulty controlling his behavior. CP 34. Respondent's reliance on this portion of *Thorell* (approval of the pattern instruction) is misplaced.

commit each offense, but rather that he is a person whose pedophilic disorder causes him "serious difficulty" in controlling his behavior. *Id.*

Under *Crane,* the distinguishing characteristic is not merely a link between disorder and risk. *Thorell*, 149 Wn.2d at 736. Rather, the state must show a causal connection between the disorder and the person's serious difficulty controlling behavior.[6] *Id.*

Respondent's position (that any connection between disorder and risk satisfies the burden) would result in civil commitment of "typical criminal recidivist[s]" who are very capable of controlling their behavior but choose not to. *Id.*, at 736.[7] This is the very result forbidden by the constitution. *Id.,* at 732; *Crane*, 534 U.S. at 413.

The state failed to show that Mr. Payne's mental condition currently causes him "serious difficulty" controlling his behavior. *Crane*, 534 U.S. at 413. Because civil commitment can only rest on such a

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[6] Such a causal connection will inevitably result in elevated risk—a person who has serious difficulty controlling behavior necessarily has a greater risk of offending. However, not everyone who is likely to engage in predatory sexual violence has serious difficulty controlling behavior. The constitution requires proof that a person's high risk of sexual offending relates to a serious difficulty controlling behavior, and that the person's mental disorder causes this serious difficulty. Mere correlation between a mental disorder and an elevated risk of sexual offending is insufficient, without proof of a causal link between the disorder and a serious difficulty controlling behavior.

[7] It is irrelevant if Dr. Carlson "explicitly asserted… that various risk factors intermingle with Payne's mental disorders and lead to an elevated risk of reoffending." Brief of Respondent, p. 16. The link between disorder and *risk* is insufficient under *Crane* and *Thorell.* Rather, the state must show a link between the disorder and the detainee's serious difficulty controlling behavior.

showing, his continued detention must be tested through a trial. *Id.*; RCW 71.09.090(2)(c)(i).

II. DR. CARLSON'S REPORT DOES NOT ESTABLISH THAT MR. PAYNE WILL "MORE PROBABLY THAN NOT" ENGAGE IN PREDATORY SEXUAL VIOLENCE.

A. Probable cause, a standard "familiar to judges as it is used frequently in the Fourth Amendment context," is established only through information that is reasonably trustworthy.

Annual review show-cause hearings turn on the issue of probable cause. RCW 71.09.090; *Det. of Petersen v. State*, 145 Wn.2d 789, 796, 42 P.3d 952 (2002). This standard "is familiar to judges as it is used frequently in the Fourth Amendment context." *Id.,* at 797.

In *Petersen,* the Supreme Court relied on search and seizure cases to outline the probable standard for show-cause hearings. *Petersen*, 145 Wn.2d at 797. This is so even though (as Respondent points out) "the SVP statute is 'resolutely civil in nature.'" Brief of Respondent, p. 6 (quoting *In re Det. of Reyes*, 184 Wn.2d 340, 347, 358 P.3d 394 (2015)).

As one example, the *Petersen* court described the burden to establish probable cause for issuance of a search warrant: "[the affiant must] recite *objective facts and circumstances* which, if believed, *would lead a neutral and detached person to conclude* that more probably than not, evidence of a crime will be found if a search takes place." *Petersen*, 145 Wn.2d at 797 (emphasis added). Similarly, a warrantless arrest is

based on probable cause where "the State's evidence, if believed, establishes the officer *had reasonable grounds to believe* a felony had been or was being committed in his presence." *Id.*

As the *Petersen* court's examples show, probable cause cannot rest on anyone's wholly subjective opinion or conclusion. Rather, the probable cause standard requires a reviewing court to make an objective, neutral determination from the facts presented. *Id.*

Because of this,

> a trial court may properly look beyond an expert's stated conclusion to determine whether it is supported by sufficient facts. Mere conclusory statements are insufficient to establish probable cause… Like a court determining whether there is probable cause for a search warrant, a court reviewing the sufficiency of the State's evidence in an SVP annual review hearing must be permitted to look at the facts contained in the report to decide whether they support the expert's conclusions.

In re Jacobson, 120 Wn. App. 770, 780–81, 86 P.3d 1202 (2004).

Respondent ignores the *Petersen* court's approach and the *Jacobson* court's elaboration of that approach. Brief of Respondent, pp. 6-8. According to Respondent, the general prohibition against weighing the facts and the obligation to assume the truth of the state's evidence requires the court to accept any conclusion put forward by the annual reviewer. Brief of Respondent, pp. 6-8.

This is incorrect. A court's probable cause determination "cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates,* 462 U.S. 213, 239, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (addressing probable cause to issue a search warrant). Thus, for example, a search warrant application based on an informant's tip "must set forth the underlying circumstances specifically enough that the magistrate can *independently judge* the validity of both the affiant's and informant's conclusions." *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012) (emphasis added).[8]

A magistrate's decision to issue a search warrant must rest on "reasonably trustworthy" information. *State v. Byrd*, 178 Wn.2d 611, 626, 310 P.3d 793 (2013); *State v. Barron*, 170 Wn.App. 742, 750, 285 P.3d 231 (2012); *State v. Afana*, 169 Wn.2d 169, 182, 233 P.3d 879 (2010); *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). The same is true of a trial judge's decision to deny a detainee a full hearing on the propriety of ongoing civil commitment.

[8] This requirement is based on a "fundamental principle: the determination of probable cause must be made by a magistrate based on the facts presented to the magistrate, instead of being made by police officers in the field." *Id.,* at 360. In the context of show cause hearings under RCW 71.09.090, annual reviewers occupy the role of "police officers in the field." *Id.* The show cause hearing ensures that probable cause determinations are made by judicial officers rather than experts paid by the agency holding the detainees.

Although the *Petersen* court did not explicitly adopt the "reasonably trustworthy" standard, it made clear that probable cause has the same meaning in both the civil commitment and the search and seizure context. *Petersen*, 145 Wn.2d at 796-97. The Supreme Court's recognition that search and seizure cases should guide probable cause determinations does not undermine the "resolutely civil" character of proceedings under RCW 71.09. *Reyes*, 184 Wn.2d at 347.

Some criminal standards do apply in RCW 71.09 proceedings. *See, e.g., Matter of Det. of Belcher*, 196 Wn. App. 592, 608, 385 P.3d 174 (2016) ("The same standard is utilized in sufficiency of the evidence challenges in SVP commitment proceedings as is used in criminal cases.") This does not transform civil commitment into criminal punishment.

Respondent's claim that "the 'reasonably trustworthy' criminal standard is not applicable in SVP cases" is simply incorrect. Brief of Respondent, p. 6. Respondent's argument ignores *Petersen* and *Jacobson*, both of which make clear that search and seizure cases should guide probable cause determinations at show cause hearings under RCW 71.09.090.

Dr. Carlson's ultimate boilerplate conclusion regarding Mr. Payne's risk of predatory sexual violence parrots the statutory language. CP 34. The Court of Appeals must look behind her legal conclusion to see

if it is sufficiently supported by "objective facts and circumstances which, if believed, would lead a neutral and detached person to conclude" that Mr. Payne meets criteria for civil commitment. *Petersen*, 145 Wn.2d at 797.

The trial judge did not do so. Instead, the trial court order is "a mere ratification of [Dr. Carlson's] bare conclusions." *Gates,* 462 U.S. at 239. Because Dr. Carlson did not adequately support her conclusion that Mr. Payne qualifies for commitment, the court's order must be vacated and the case remanded for trial. *Petersen*, 145 Wn.2d at 803-04.

B. The state failed to show that Mr. Payne will more probably than not engage in predatory sexual violence if released.

Nowhere in her report does Dr. Carlson claim that Mr. Payne will "more probably than not" engage in predatory sexual violence. CP 11-34. Nor does she claim that he himself is more than 50% likely to reoffend, or that he belongs to a group whose members are more than 50% likely to reoffend.[9] CP 11-34.

In a boilerplate concluding paragraph, she parrots the statutory language to assert that Mr. Payne is "likely to engage in predatory acts of sexual violence." CP 34; *cf* RCW 71.09.020(7) and (18). This legal

[9] The "more probably than not" standard equates to a recidivism risk of greater than 50%. *In re Det. of Brooks*, 145 Wn.2d 275, 295-89, 736 P.3d 1034 (2001), *overruled in part on other grounds by Thorell*, *supra*.

conclusion does not consist of "objective facts and circumstances" from which a "neutral and detached person" could make the required determination. *Petersen*, 145 Wn.2d at 797; CP 34. Nor do the facts contained in the rest of her report support this legal conclusion.

Dr. Carlson makes two factual claims relating to Mr. Payne's risk. First, she estimates his general risk of sexual reconviction[10] at approximately 32% over ten years.[11] CP 28. She does not relate this result to his specific risk of predatory sexual violence. Furthermore, although she cautions that the 32% figure is not "absolute," she does not claim that his Static 99R result justifies commitment. CP 28.

Second, she concludes (based on an "intermingl[ing]"of Mr. Payne's dynamic risk factors and "aspects" of his diagnoses) that he has "an *elevated risk of sexual offending* if he were not confined." CP 32 (emphasis added). She does not claim that this "elevated risk of sexual offending" means that he more probably than not will engage in predatory sexual violence. CP 32; *see* RCW 71.09.020(7) and (18).

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[10] The Static 99R does not purport to measure the risk of predatory acts of sexual violence. *See* Static 99R Coding Rules (2003), p. 3 (available at http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf, last accessed 10/17/16).

[11] Respondent correctly notes that Mr. Payne's Static 99R score situates him within a group whose rate of sexual reconviction is approximately 32% over 10 years. Brief of Respondent, p. 11. However, whether one describes Mr. Payne as having a particular risk or as belonging to such a group is immaterial to the argument here. The critical figure is Dr. Carlson's Static 99R result: 32% over ten years. CP 28. Whether considered by itself or in conjunction with other information, the Static 99R result is insufficient to justify confinement.

Dr. Carlson did not explain how she arrived at her ultimate conclusion that Mr. Payne qualifies for commitment. Although she is not required to follow best practices or to quantify Mr. Payne's risk, she must provide "objective facts and circumstances" so that her ultimate legal conclusion can be reviewed. *Petersen*, 145 Wn.2d at 797.

The state's insistence that her conclusions be taken at face value is inconsistent with *Petersen, Jacobson,* and all of the search and seizure cases requiring more than a "mere ratification" of such conclusions. *Gates,* 462 U.S. at 239.

Respondent also appears impressed by the length of Dr. Carlson's report. Brief of Respondent, pp. 9-10. But neither the length of a report nor the volume of facts cited can be dispositive. A long report citing a large number of facts that don't support the expert's conclusions will not satisfy the state's burden. By the same token, a statement outlining an expert's conclusions together with supporting facts will be adequate, even if it is brief.

Dr. Carlson's report contains many facts. These include the 32% figure from the Static 99R, her caution that this number is not "absolute," and her determination that Mr. Payne has an "elevated risk of sexual offending." CP 28, 32. Even "if believed," these facts do not show that Mr. Payne will more probably than not engage in predatory violence.

The state did not make present sufficient evidence to allow Mr. Payne's civil commitment to continue without trial. The trial court's order must be reversed and the case remanded for trial. *Petersen*, 145 Wn.2d at 803-04.

III. IF THE STATE SUBSTANTIALLY PREVAILS, MR. PAYNE SHOULD NOT BE ASKED TO PAY APPELLATE COSTS.

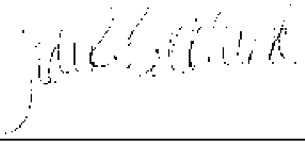
Respondent does not address appellate costs. Accordingly, for the reasons set forth in the opening brief and in RAP 14.2, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The trial court's order must be reversed and the case remanded for a new trial.

Respectfully submitted on March 8, 2017,

BACKLUND AND MISTRY



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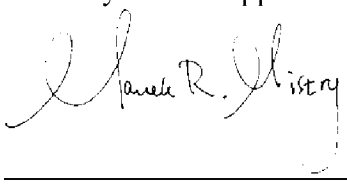

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CERTIFICATE OF SERVICE

I certify that on today's date:

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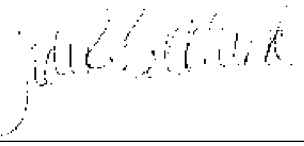
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 8, 2017.



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Appellant's Reply Brief

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